

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002



(202) 565-5330
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DATE: **February 23, 2000**

CASE NO. **1999-INA-99**

In the Matter of:

S & S CONFECTIONERS,
Employer,

on behalf of

LUIS FABIAN,
Alien.

Appearance: Susan Au Allen, Esq.
Washington, D.C.

Certifying Officer: Richard E. Panati
Philadelphia, PA

Before: Burke, Neusner and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing,

qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

STATEMENT OF THE CASE

On September 17, 1997, Employer, who identified its business as "Bakery/Restaurant," filed an *Application for Alien Employment Certification* ("ETA 750A"), to permit the employment of the Alien as a "Shift Leader" with the following duties:

Coordinate the activities of workers engaged in serving food, in removing food after meals and cleaning counters, tables and working areas. Assist workers in serving customers and any other duties as necessary. Train production sales personnel, inspect serving operations to assure that supplies are adequate and purchase supplies. (AF 32).

Employer required two years of experience in the job offered or two years of experience in the related field as a supervisor in a commercial enterprise. *Id.* It noted also that as the restaurant operated 24 hours, applicants for the position must be willing to work variable shifts, including holidays and weekends. *Id.*

The ETA 750A was accompanied by an *Affidavit of Publication*, to the effect that the position had been advertised in July 1997 in the *Washington Times*, and by a report from the Employer's Manager that there had been no response to the advertisement. (AF 35). Based on this recruitment effort, Employer requested a reduction in any such further efforts. (AF 36).

The position was classified by the State agency responsible for the initial processing of the application as a "Manager, Fast Food Services" under *Dictionary of Occupational Titles (D.O.T)* Code 185.137.010. (AF 23). The record includes a letter to the State agency from Employer's then counsel in which he protested this classification on the basis that in a previous application for another alien for the same position, the job had been classified as "Waiter/Waitress Head" under *D.O.T.* code 311.137.022. (AF 37). Employer submitted documentation showing that its ETA 750A, for another alien for the exact same position, which was filed on December 19, 1996, had been classified under Code 311.137.022 and approved by the CO on June 30, 1997. *Id.*

Upon receipt of the ETA 750A, the CO proceeded to issue a Notice of Findings ("NOF"), proposing to deny the application on the basis that Employer had not established that the requirements for the job opening were those normally required for the job in the United States. *Id.* Quoting the

D.O.T. description for “Manager, Fast Food Services,” the CO noted that as the position involved the management of a Dunkin’ Donuts outlet, it conformed with this description. *Id.* The CO further indicated that the Specific Vocational Preparation (“SVP”) for this position was only six months up to and including one year, and accordingly, Employer’s requirement of two years experience was excessive. *Id.*

Employer was informed that it could rebut this finding by submitting evidence that the two year requirement arises from a business necessity which must include the following:

Documentation from **Dunkin’ Donuts’** franchise headquarters showing that your requirements are the minimum job requirements established within the **Dunkin’ Donuts** franchise for managerial positions nationwide; and

Information showing that **Dunkin’ Donuts** employees who had less than the minimum job requirements now required were unable to perform the duties of the position. *Id.*

Employer was directed also to prove that the job, as currently described existed before the alien was hired by submitting position descriptions, organizational charts, payroll records, resumes of former incumbents and copies of job advertisements for other managerial positions, "not associated with labor certification applications," placed within the prior three years. *Id.*

In its rebuttal, filed on September 8, 1998, Employer contended that it was not a fast food restaurant, but a retail outlet that sells prepared food and although the crew did make bagels and serves coffee to customers, this does not comprise a "great deal of the overall day to day duties." (AF 8-10). Employer noted that its franchiser did not require any minimum experience for employees of individual franchise owners but maintained that the two year requirement was justified because of the responsibilities of the position. *Id.* These were said to include making sure that the high quality control that is required by the franchiser is maintained on a day-to-day basis and insuring that the store maintains and complies with state and federal health and safety standards. *Id.* They included also training production sales personnel, maintaining inventory of and purchasing supplies, and dealing with the financial aspects of the business. *Id.*

The rebuttal was accompanied by a copy of an advertisement published in the *Washington Times* on November 10, 1996, which describes an opening at Employer’s place of business for essentially the same position as that described in the ETA 750A filed in both the instant case and the previously mentioned ETA 750A filed by Employer on December 19, 1996. (AF 11). Included also was a copy of Employer’s menu which showed that it served donuts, muffins, bagels, breakfast sandwiches, deli sandwiches and soups. (AF 12).

After reviewing Employer’s rebuttal, the CO found that it had not established a business necessity for its two years experience requirement and issued a Final Determination (“FD”), denying the

application. (AF 5-7). The CO subsequently denied Employer's motion for consideration and submitted the record to the Board of Alien Labor Certification Appeals ("Board") for review.

DISCUSSION

Section 656.20(b) of the regulations provides, in pertinent part:

- (2) The employer shall document that the job opportunity has been and is being described without unduly restrictive requirement;
- (i) The job opportunity requirements unless adequately documented as arriving from business necessity;
- (A) Shall be those normally required for the job in the United States;
- (B) Shall be those defined for the job in the *Dictionary of Occupational Titles (D.O.T.)* including those for subclasses of jobs.

The *D.O.T.* describes a "Manager, Fast Food Services" (Code 185.137-010) as follows:

Manages franchised or independent fast food or wholesale prepared food establishment: Directs, coordinates, and participates in preparation of, and cooking, wrapping or packaging types of food served or prepared by establishment collecting of monies from in house or take out customers, or assembling food orders for wholesale customers. Coordinates activities of workers engaged in keeping business records, collecting and paying accounts, ordering or purchasing supplies, and delivery of foodstuffs to wholesale or retail customers. Interview, hires, and trains personnel. May contact prospective wholesale customers such as mobile food vendors, vending machine operators, bar and tavern owners, and institutional personnel, to promote sale of prepared foods, such as **donuts, sandwiches, and specialty food items**. May establish delivery routes and schedules for supplying wholesale customers. Workers may be known according to type or name of franchised establishment or type of prepared foodstuff retailed or wholesaled.

(Emphasis added.)

The current edition of the *D.O.T.*, i.e. the **1991 Edition**, appended a SVP time to each classification. This has replaced the use of a separate *Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles* which had to be consulted previously to determine the SVP of an occupation. The SVP for Code 185.137-010 is listed in the revised *D.O.T.* as a "7," meaning that persons holding this position are normally required to have six months to one year of experience and training.

Where an employer's education and/or experience requirement for a position exceeds the SVP standard, the requirement may be unduly restrictive unless there is a showing of "business necessity" for the excessive requirement. See *Transgroup Services, INC.*, (88-INA-428) (Feb. 21, 1990). As defined by the Board in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) to show "business necessity," an employer must establish:

- (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and
- (2) that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

Employer's rebuttal in the instant case describes a job which is different from that set forth in the original ETA 750A. For example, the job duties in the application do not include responsibility for quality control or financial matters, duties upon which Employer bases its justification for its two years experience requirement. In any event, even if these were the duties described in the ETA 750A, they are basically in keeping with the *D.O.T.* description for the position utilized by the CO, i.e. "Manager, Fast Food." Therefore, Employer has failed to carry its burden of proving that the greater experience requirement is a business necessity.

We note also that the only evidence submitted by Employer to show that it has not hired workers for the position with less experience that it is now requiring is the copy of its advertisement, dated November 10, 1996. However, it is obvious that this was a pre-application recruitment effort in connection with the ETA filed in December 1996. Consequently, it does not conform with the CO's reasonable instruction to submit evidence of Employer's having required two years of experience in other than an alien certification case.

Accordingly, the following order shall enter:

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel:

Todd R. Smyth

Secretary to the Board of
Alien Labor Certification Appeals

TRS/jw

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.